ARCO
Legal
555 Seventeenth Street
Denver, Colorado 80202
Telephone 303 293 4444

Jeffrey H. Desautels
Senior Attorney

April 25, 1990

VIA HAND DELIVERY

Sandra R. Moreno, Esq.
Suzanne Bohan, Esq.
U.S. Environmental Protection Agency
Region VIII, Suite 500
One Denver Place, 999 18th Street
Denver, Colorado 80202

VIA FEDERAL EXPRESS

Michael Goodstein, Esq.
U.S. Department of Justice
10th & Pennsylvania N.W.
Washington, D.C. 20530

Copy to:
Greg M. ✓
Tom E. (MDHES)
J.F. Sato ✓

Re: **East Helena CERCLA Site**

Dear Ms. Moreno, Ms. Bohan and Mr. Goodstein:

In our meeting with EPA, the State of Montana and ASARCO on March 22, 1990, ARCO asked what EPA's basis was for providing ARCO with Special Notice as a potentially responsible party ("PRP") for the Process Ponds Operable Unit at the East Helena CERCLA site (the "Site"). We informed the Agency that ARCO had no reason to believe that The Anaconda Company ("TAC") had contributed to or exacerbated contamination in the Lower Lake or other areas addressed by the Process Ponds Operable Unit. (In this regard, we understand that American Chemet and Burlington Northern were not provided with Special Notice on the basis that they had not contributed to the contamination in the Lower Lake.)

During the March 22 meeting, the Agency was unable to respond to our inquiry and provide ARCO with any evidence that TAC had contributed hazardous substances to the Lower Lake or to other areas addressed by the Process Ponds Operable Unit. Instead, the Agency looked to ASARCO to provide such information. To date, we have not received any documentation from ASARCO or from the Agency, and have not identified any information ourselves, which would lead us to believe that TAC's operation of the zinc fuming plant at the East Helena Site would give rise to liability under CERCLA for the Process Ponds Operable Unit. Instead, our investigations since the March 22 meeting have led directly to the opposite conclusion.

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Ms. Moreno has requested that we provide the Agency with our analysis of why ARCO should not be considered a PRP for the Process Ponds Operable Unit. As a threshold matter, we note that decisions have firmly established that EPA has the burden of proving that ARCO falls within one of the classes of liable parties described in Section 107 (a)(4) of CERCLA. United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987); United States v. Conservation Chemical Co., 619 F. Supp. 162 (1986) (W.D. Mo. 1985). Nevertheless, we are providing you with the analysis below to demonstrate that ARCO is not liable under CERCLA for the Process Ponds Operable Unit.

In addition to the absence of any credible evidence linking TAC to the Lower Lake and other areas addressed by the Process Ponds Operable Unit, another reason exists to conclude that ARCO is not liable under Section 107(a) of CERCLA. In response to a question at the March 22 meeting, Mr. Goodstein informed us that ARCO's alleged liability is premised solely on the theory of successor corporation liability to TAC. However a recent federal District Court decision holds that successor corporations are not liable under CERCLA unless they otherwise fall within one of the classes of liable parties under CERCLA § 107(a)(4). The Anspec Company v. Johnson Controls, Inc., 19 Chem. Waste Lit. Rep. 174 (E.D. Mich. 1989). Particularly since TAC had no involvement with and no responsibility for the zinc fuming facility at the time ARCO acquired Anaconda, ARCO is not liable as a successor corporation to TAC.

I. OVERVIEW OF TAC'S OPERATIONS OF THE ZINC FUMING PLANT

TAC operated the zinc fuming plant at the ASARCO East Helena Smelter site on property leased from ASARCO from 1927 through 1972, under leases dated April 1, 1958, January 1, 1941 and December 20, 1927. See Exhibit 10 of ARCO's April 10, 1987 Response to EPA's March 12, 1987 Information Request ("ARCO's 1987 Response"); ARCO's March 15, 1990 Response to Question 9 of the Agency's February 8, 1990 Information Request ("ARCO's March 1990 Response"). ASARCO purchased the zinc fuming plant from TAC under an Agreement between TAC and ASARCO dated July 3, 1972 (the "1972 Agreement"). See Exhibit 11 of ARCO's 1987 Response. The 1972 Agreement terminated the lease between ASARCO and TAC. ASARCO continued to operate the zinc fuming plant until 1982. TAC retained no control over ASARCO's operation of the zinc fuming plant following the 1972 Agreement.

In general terms, the zinc fuming plant simply reprocessed the slag generated by the ASARCO lead smelter for the purpose of capturing zinc

oxide and lesser amounts of lead. No chemical constituents were used in the process except pulverized coal to provide fuel for the firing of the blast furnace and either molten or granulated cold zinc rich slag which originated from the ASARCO lead smelter. In the blast furnace, the slag was heated to a high temperature which fumed the zinc. The hot vaporized zinc was then cooled and mixed with outside air producing the product, zinc oxide. The zinc oxide was captured in a very efficient baghouse and the cleaned gases were vented to a stack. The waste from this fuming process was the treated slag. The treated slag remained the property of ASARCO throughout the fuming process, and was disposed on site. See ARCO's March 9, 1990 Response to Question 9.

II. TAC'S NON-CONTACT COOLING WATER SYSTEM

A. TAC Only Discharged Non-Contact Cooling Water to the Lower Lake. TAC operated a non-contact zinc fuming furnace cooling water system during its period of operations of the zinc fuming plant. Cooling water was pumped from Lower Lake through a closed transport piping system to non-contact cooling cells in the furnace and then discharged back to the Lower Lake through a closed piping system. The cooling water was used in the furnace on a once through basis. Since the cooling system was a non-contact system, metals did not enter the cooling water from the zinc fuming furnace. The Lower Lake itself, from which the cooling water was pumped, was the only source from which metals could have been picked up by Anaconda's non-contact cooling water system. Exhibit A to this letter is a 1970 site plan sketch prepared by TAC which shows the approximate location of TAC Operations, the cooling water pumphouse, and the cooling water discharge to the Lower Lake. ARCO discovered Exhibit A during investigations following our March 22, 1990 meeting. (We are preparing separately a supplemental response to our April 1987 and March 1990 Responses which we intend to provide to the Agency as soon as possible.)

The basis for ARCO's conclusion that TAC discharged only non-contact cooling water to the Lower Lake is provided in part by engineering drawings we recently obtained from ASARCO. These

engineering drawings are attached hereto as Exhibit B. Engineering Drawing HG-5, dated August 2, 1927, shows the zinc fuming plant's non-contact cooling water system, including discharge and withdrawal points. Engineering Drawing HG-4, dated April 4, 1928, provides greater detail of the water handling system. Engineering Drawing HG-17 dated March 17, 1961 also shows the water system. Engineering Drawing HG-20, dated October 1963 describes an expansion of the non-contact cooling water system from a 2000 gpm pump to a 5000 gpm pump. We did not obtain any documentation from ASARCO, and are not aware of any other information, which would indicate that the zinc fuming plant discharged anything other than non-contact cooling water to the Lower Lake. Mr. Walter Unger, former environmental engineer for both TAC and ARCO, has confirmed that the zinc fuming plant only discharged non-contact cooling water to Lower Lake. We are in the process of obtaining Mr. Unger's affidavit to that effect, and will supplement this letter as soon as possible. We are also attempting to secure additional information from former TAC employees familiar with zinc fuming plant operations.

B. Discharges from the Non-Contact Water Cooling System Did Not Contribute To or Exacerbate in any Way the Contamination in Lower Lake. An analysis of four water samples taken at the East Helena site on September 17, 1970 is attached as Exhibit C. The samples in Exhibit C were designated as follows:

A - Above Anaconda and ASARCO. Cooling Pond 24 hour sample
B - Below Anaconda and ASARCO. Cooling Pond 24 hour sample
C - Anaconda discharge to Cooling Pond 24 hour sample
D - Prickley Pear Creek below ASARCO. discharge grab sample

These are the only sample analyses we have identified to date from the period of TAC's operations of the zinc fuming plant. As noted above, Sample C is a 24 hour sample of TAC's discharge to the cooling pond (Lower Lake). For all parameters other than calcium and copper, Sample C results were less than or equal to the sample results from Sample A (above Anaconda and ASARCO, cooling pond 24 hour sample) and Sample B (below Anaconda and ASARCO, cooling pond 24 hour sample.) Sample C results for

calcium were only 8 ppm higher than Sample A results. Sample C results for copper were only .01 ppm higher than Sample A and B results. Thus, the sample from TAC discharge was substantially similar to the cooling pond and Prickly Pear Creek samples. ARCO strongly believes that these samples confirm what we have always expected: discharges of non-contact cooling water from TAC Operations did not contribute to or exacerbate in any way the contamination of the Lower Lake. The cooling water system for the zinc fuming furnace was a closed, non-contact system. Contaminants normally could not have entered the system from the zinc fuming plant during operation of a non-contact cooling water system. To the extent that any contaminants were in the cooling water, such contaminants must have originated in the Lower Lake from which the cooling water was withdrawn. The non-contact cooling water system for the zinc fuming plant did not add any constituent to the water withdrawn from Lower Lake.

III. CONCLUSION

Based upon available information, ARCO strongly believes that it is not liable under Section 107(a) of CERCLA for the Process Ponds Operable Unit. The zinc fuming plant only discharged non-contact cooling water to the Lower Lake. EPA has not established that TAC in any way contributed to or exacerbated contamination in the Lower Lake or other areas addressed by the Process Ponds Operable Unit. Furthermore, EPA has premised ARCO's CERCLA liability solely on its status as a successor corporation to TAC. Under the Anspec decision cited above, ARCO has no liability in these circumstances.

For the above reasons, ARCO respectfully requests that EPA withdraw the Special Notice Letter issued to ARCO, and notify ARCO that it is not being considered as a PRP for the Process Ponds Operable Unit, prior to the expiration of the 60-day period for a good faith offer under the Special Notice Letter (May 1, 1990). If the Agency is aware of any information demonstrating that TAC did contribute to or exacerbate contamination in the Lower Lake or other areas addressed by the Process Ponds Operable Unit, ARCO hereby requests that EPA provide ARCO with such information. We are informed that the Agency recently issued a CERCLA Section 104(e) information request to ASARCO concerning the zinc fuming

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plant. ARCO respectfully requests that EPA immediately provide ARCO with any information ASARCO provides to the Agency pursuant to such request.

Under CERCLA § 122(e)(2)(3), ARCO has 60 days after receipt of Special Notice to make a proposal for undertaking or financing remedial action at the Site. For the reasons set forth in the letter, we believe ARCO has no liability for the Process Ponds Operable Unit. Therefore, we do not believe that a proposal for undertaking or financing action at the Site is necessary or appropriate. If, after review of this letter and the supporting documents attached and to be supplied, EPA determines that ARCO should be considered a PRP at the Site, ARCO requests an additional 30 days to submit a good faith offer in response to the Special Notice Letter dated February 23, 1990.

We are available to meet with the Agency to discuss this matter further upon your request. If you have any questions, or would like to arrange for a meeting, please call me at 293-4444 or Robert Lawrence at 293-6508. We look forward to your response.

Sincerely,

Jeffrey H. Desautels
Sr. Attorney

JHD:RWL:ghl
Attachments
cc: Cynthia S. Leap, Esq.
William O. Hart, Esq.
Dr. Richard Krablin
Robert L. Dent
Robert W. Lawrence, Esq.